Odhiambo v Republic (Criminal Miscellaneous Application 175 of 2019) [2024] KEHC 13108 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13108 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION 175 OF 2019

PN GICHOHI, J

OCTOBER 29, 2024

BETWEEN

DANIEL ODHIAMBO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Through a Notice of Motion dated 4th November 2019 filed together with a Petition, Daniel Odhiambo (Applicant) urges this Court to grant orders of revision of the sentence of 35 years imprisonment issued in by the trial court vide a judgment delivered in Nakuru Chief Magistrate's Court Criminal Case No. 2727 of 2005.

2. The grounds are that the said sentence is harsh and a violation of his rights under articles 50 (2) (q) and 27 (1) (2) (5) of *the Constitution*. Further, he states that he has been rehabilitated during the 20 years he has so far served in prison.

3. The Respondent has opposed that application through a Replying Affidavit sworn by learned Prosecution Counsel James Kihara on 23rd April 2024. The grounds are that the Applicant has not indicated any irregularity, illegality or any form of constitutional in regard to the sentence and if the Appeal Courts failed to address in regard to the correctness of the sentence.

4. He further states that the Applicant has exhausted all his appeal options and therefore this Court is functus officio.

5. The Applicant filed on 23rd April 2024 his submissions dated 14th February 2024. He admits having appealed the conviction and sentence both High Court and Court of Appeal dismissed the said appeal. However, and while citing discretionary powers of this Court under Article 165 (3) of *the Constitution*, he submits that though the life sentence was substituted with a term of 35 years imprisonment, the sentence is still too heavy to bear and extremely long considering that the circumstances of the case as

it happened due to sheer bad luck due to over drinking. He urges this Court to consider that under section 26 (2) of the Penal Code, he can have a shorter sentence.

6. Claiming that he "was arrested" at "the age of (3) years" and that he is now aged 51 ½ years, he submits that his family has suffered during the period as he was the sole breadwinner of his two children whose mother left after he was imprisoned. That he will have wasted his life in prison not to mention that his two innocent children would suffer irreparably should the Court disallow the application.

7. He submits that he is fully reformed, is remorseful and is a first a first offender. In the circumstances, he urges the Court to consider a non- custodial sentence. Otherwise, he urges the Court to consider the period he has spent in custody as provided for under Section 333 (2) of the Criminal Procedure Code.

Determination

8. This Court has heard the parties. To start with, it not factual for the Applicant to refer to his age as being 3 years at the time of arrest. From the court records, he was an adult. It was the victim who was said to be 3 years old.

9. The issue here is whether this Court should interfere with the sentence herein bearing in mind that this is not an appeal. The Applicant refers to it as revision and substitution.

10. The court records reveal that before the trial court, the Applicant was charged with the offence of defilement of a girl contrary to section 145 (1) of the Penal Code and ultimately found guilty and convicted.

11. He was actually a first offender according to the Respondent. In mitigation, the Applicant prayed for mercy saying that he took care of his younger brothers and sisters. He was sentenced to serve 35 years imprisonment with hard labour.

12. It is noted while sentencing, the trial court H. M. Nyaga, SRM (as he then was) held: -

> " What pleasure does a man have derive in having sex with 3-year-old? The accused is now thinking of his siblings while he has defiled a child. To me, this is the worst act that a human being can perpetrate against a young innocent girl. She may be mentally scarred for life.
>
> Accused deserves a punishment that befits his inhuman way, beastly act."

13. Aggrieved, the Appellant preferred an appeal being High Court Criminal Appeal No. 92 of 2007 against the sentence only and on the grounds that he had changed his behaviour during the period he was in custody and wanted to go back to the society and impact others with the knowledge he had acquired in prison as to how to behave in the society. He maintained that his siblings looked up to him for support and therefore needed him.

14. It is noted that the appeal was opposed by the Respondent who urged the Court not to interfere with the sentence considering that the complainant was said to be aged 3 years according to the doctor, though her mother stated the child was actually aged 2 years at time she was defiled.

15. It is also clear that High Court (R. P.V. Wendoh J) considered the age of the child and that the Applicant herein took advantage of the child when she went to watch Television. While noting that Section 145 (1) of the Penal Code provided for a sentence of life imprisonment and hard labour, the Court found that the Appellant was only sentenced to 35 years which would be subject to remission if his conduct was good, the Judge saw no reason to interfere with the sentence meted on the Appellant therein and hence dismissed the appeal.

16. It is also clear from the records that the Applicant was aggrieved by the High Court decision and preferred an appeal to Court of Appeal Nakuru being Criminal Appeal No. 31 of 2011. In dismissing the appeal, the Court considered that Section 145 of the Penal Code was amended in 2003 through *Act No. 5 of 2005* providing that the punishment for defilement of a girl was life imprisonment with hard labour. The Court held that it had no jurisdiction to entertain the grievance by the Applicant herein that he had been in jail for too long as that was an issue of fact.

17. If what the Applicant herein has in mind is resentencing, this Court is satisfied that the Applicant has exhausted the appeal process and the issue of the long sentence has been dealt with by both superior Courts which dismissed the Applicant's appeal.

18. Be that as it may, the Applicant was an adult defiling a three -year old girl. He is now talking of rehabilitation and seeking mercy. He proposes a non- custodial sentence saying he wishes to take care of his two children apparently forgetting the harm he cased to the child in this case.

19. Sentencing was emphasised in Maingi v Republic (Criminal Appeal E112 of 2023) [2024] KECA 423 (KLR) (26 April 2024) (Judgment) where the Court of Appeal cited with approval the sentencing policy as re-stated by Mativo, J. (as he then was) in Petition No. 97 of 2021-Edwin Wachira & Others vs. Republic thus:

> " 26. The core value is to ensure that courts impose a 'just and appropriate' sentence. This requires a judge sentencing an offender to ensure that the 'aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.' The "just and appropriate sentence" arrived at considering the peculiar circumstances of the case can only be arrived if the sentence is fixed and pre-determined regardless of the peculiar circumstances. Some defilement cases are preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserve no mercy. Stiffer or even maximum sentences must be deployed in such cases. Other cases involve very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserve no mercy. Others cases involve persons who have been entrusted with young children, and they abuse the trust. Such persons deserve no mercy."

20. While dismissing the appeal and upholding the life imprisonment imposed on the Appellant for defiling a 10-year-old girl, the Court of Appeal in Maingi v Republic (supra) held: -

> " The appellant committed a seriously heinous offence that this court frowns upon. He defiled a minor aged 10 years of age. He prayed for leniency as he was of advanced age and was not remorseful. How can the issue of advanced age be a mitigating factor? How can a person who qualifies to be a grandfather of a child plead age as a mitigating factor? Being an adult is the reason that one should protect a child and not use force to satisfy one's sexual desires. That is the kind of person that should be kept away from the society."

21. In *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Appellant who was aged 18 years at the time he defiled the 4 ½ year old had been sentenced to serve life imprisonment. High Court dismissed his appeal and that prompted the Appellant to move to the Court of Appeal. In its judgment, the Court of Appeal upheld the

Appellant's conviction for the offence of defilement but substituted the life imprisonment with a sentence of 40 years imprisonment to run from the date of conviction.

22. In the circumstances of this case, the 35 years imprisonment remains a lawful and valid deterrent sentence which should not be interfered with regardless of the Applicant's efforts to persuade the courts.

23. In regard to period spent in custody, there is no indication that in HCCRA. No. 92 of 2007, High Court considered Section 333 (2) of the Criminal Procedure Code when it upheld the sentence.

24. That decision was however delivered after the Court of Appeal's decision in Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR which emphasised on Section 333(2) of the Criminal Procedure Code when it held: -

> " The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333 (2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

25. In the circumstances, and considering that the Respondent has no objection, this court is inclined to grant the prayer that the time spent in custody be considered.

26. In conclusion, the Court makes the following orders: -

    1. The Applicant's prayer for revision of the sentence is dismissed.

    2. The sentence of 35 years imprisonment with hard labour to run from the date of the Appellant's arrest being 14/10/2005.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Daniel Odhiambo-Applicant

Mr. Kihara for Respondent

Ruto- Court Assistant